IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 763

HUGH GREER CARRUTHERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, NO. 8790 AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered December 27, 1945, affirming a judgment, entered on a verdict, of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered February 20, 1945, convicting petitioner upon an indictment charging violation of the Mail Fraud Act, the fraud section of the Securities Act of 1933 and the Conspiracy Statute.

Opinion Below.

The opinion of the Circuit Court of Appeals is as yet unreported. It appears at Rec. 503.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 27, 1945. Jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945, 28 U. S. C. 347 (a). See also Rule XI of the Criminal Appeals Rules promulgated by this Court, May 7, 1934. Stay of mandate pending this petition was entered January 2, 1946.

Questions Presented.

1. Whether the free exercise of religion guaranteed to petitioner by the First Amendment to the Constitution was not violated by the court's charge to the jury as follows: (Rec. 455-456)

> "The first amendment of the constitution of the United States provides as follows:
>
> > 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'
>
> This provision of the constitution as a matter of law, protects the defendants, and each of them, from any inquiry by you into the truth or falsity of any of the religious beliefs, or doctrines, or representations made by the defendants, or any of them, which dealt with such beliefs or doctrines. In the consideration of the question of the guilt or innocence of the defendants in this case you must assume that any and all representations made by the defendants, or any of them, concerning matters pertaining to their religious beliefs or doctrines, were true at the time they were made, and this is so, irrespective as to whether such repre-

sentations were written or oral, or partly written and partly oral, or merely based upon inferences which you may draw from printed or written documents in evidence.

You are further instructed that representations of the defendants, or any of them, concerning or relating to the subjects of breathing, silence, and position of persons during sleep, if you believe that they are matters within the field of religion, as taught by the defendant Carruthers, and the truth or falsity of such representations, if any, may not be questioned in any way by you in arriving at your verdict in this case."

2. Whether the denial of petitioner's motion, promptly made, to withdraw a juror and continue the case, based upon the reading by a juror of an admittedly inflammatory and grossly prejudicial newspaper article published during the trial, was not reversible error. The article, which was published in the *Chicago Daily News,* reads as follows: (Rec. 438)

"LAMA DODGES QUESTIONING ON ROBBERY.

The Kum Bum Lama dodged the witness stand in his Federal Court fraud trial this afternoon, and averted a showup of his career as highway robber before he grew a beard and named himself Dr. Hugh Greer Carruthers.

The defense rested, and then Judge Philip L. Sullivan denied a defense motion for a directed verdict of not guilty offered for Carruthers. The judge held in abeyance, until he receives the jury's verdict, motions for directed acquittal of the other defendants, Evelyn Kroell and Mary Morel.

Prosecutor Francis J. McGreal had planned to put into the record, in cross-examination, the fact that Carruthers, under his real name of Henry Boerum, Jr., served a prison term in New York State for highway robbery. The failure of Carruthers to testify prevented this.

The defense attorneys, Walter Bachrach and Edward Hess, asked a directed acquittal on argument that Carruthers' Neological Foundation was a religion, like the 'I am' cult, whose sponsors won in the high courts.

The defense had conceded in court that the 'doctor' was really only Henry, a postal clerk from Brooklyn, and had not been educated as a lama in Tibet, but had merely learned the alphabet and some words as a fifth grade pupil in a Brooklyn public school.

Closing arguments will begin Monday."

3. Whether the charge to the jury relative to the presumption of innocence was not so improper and did not necessarily result in prejudice to petitioner of so fundamental a character as to deprive him of a fair trial and to require a reversal of the conviction, even though no exception was taken to it. The charge in question was as follows: (Rec. 454)

"The defendants under the law are presumed to be innocent of the charge. This presumption remains throughout the trial with the defendants until you have been satisfied by the evidence in the case beyond all reasonable doubt of the guilt of the defendants or either of them.

This presumption of innocence is not intended to aid anyone who is in fact guilty of crime to escape, but is a humane provision of the law intended, so far as human agencies can, to prevent an innocent person from being convicted."

Statutes Involved.

Sec. 215 of the Criminal Code, commonly referred to as the Mail Fraud Act, 18 U. S. C., Sec. 338, provides in part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining

money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, * * * in any post office * * * of the United States * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both."

Sec. 17(a)(1) of Title I of the Securities Act of 1933, 15 U. S. C., 77 q(a)(1) provides as follows:

"(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—(1) To employ any device, scheme, or artifice to defraud, or"

Sec. 37 of the Criminal Code, 18 U. S. C., Sec. 88, provides as follows:

"If two or more persons conspire either to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Sec. 632 of Title 28 U. S. C., provides as follows:

"In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, * * * the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

Summary Statement.

Petitioner was one of three defendants[1] named in an indictment consisting of 36 counts. The first 9 charge a violation of Sec. 77q (a)(1) of Title 15, U.S.C.A. Counts 10 to 35, both inclusive, charge a violation of the mail fraud statute, Sec. 338 of Title 18, U.S.C.A., and Count 36 charges a conspiracy under Sec. 88 of Title 18, U.S.C.A., to commit the substantive offenses described in Counts 1 to 35, both inclusive.[2]

Count 1 of the indictment sets forth an alleged scheme[3] to defraud in connection with the sale of receipts, promissory notes and evidences of indebtedness of the Neological Foundation and of petitioner, Hugh Greer Carruthers. It is alleged that as a part of the scheme the defendants organized the Neological Foundation, an unincorporated society, and that the petitioner, Carruthers, broadcast a radio program of a spiritual and economic character for the purpose of obtaining members who would pay dues and make investments in the Neological Foundation, and that (Rec. 4) he prepared, published, mailed and delivered to listeners to the radio program who inquired for further information and to prospective and actual members of the organization, certain pamphlets, lessons and literature which related to the purposes, activities and functions of the Foundation. (Rec. 5) These lessons, pamphlets, letters and literature, according to the allegations, were for the purpose of assisting and enabling members of the Foundation and persons intended to be defrauded to find personal

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[1] Two defendants were acquitted by the District Court after verdict of guilty was returned against the three.

[2] Counts 5 and 9 were eliminated on the motion of the Government at the close of its case.

[3] The scheme alleged in the first count was incorporated by reference into all succeeding counts.

satisfaction and solace and to better themselves economically and socially. (Rec. 6)

It is also alleged that "it was a further part of said scheme and artifice that the said defendants would, intended to and did cause to be formed, created and organized, and did form, create and organize clubs, associations, groups and classes within and among the members of the said Neological Foundation, and among the persons intended to be defrauded, for the purpose of further and more detailed study and benefit from the teachings, philosophy, and creed of the said Neological Foundation and the said defendants (including petitioner)." (Rec. 7)

Seventeen Government witnesses (Rec. 190, 194, 196, 201, 213, 216, 218, 224, 227, 229, 231, 235, 238, 251, 266, 273, 281) and forty-nine defense witnesses (Rec. 291, 294, 298, 303, 314, 308, 311, 313, 316, 318, 319, 320, 323, 325, 329, 330, 331, 336, 338, 341, 343, 346, 350, 354, 357, 360, 362, 363, 367, 368, 371, 372, 374, 376, 377, 378, 380, 382, 383, 384, 387, 388, 389, 391, 393, 410, 411, 412, 414, 419, 422) testified that the Neological Foundation and the teaching of petitioner were of a religious character. No witness testified to the contrary.

The Prosecutor elicited on his examination of a Government witness (Rec. 251) and his cross-examination of witnesses called by petitioner that he had given instruction to the members upon the subject matter of breathing, silence, (meditation and prayer) and position of persons during sleep. No evidence showing the falsity of such instruction or representations was introduced, but by such examination and cross examination the Prosecutor did his best to ridicule the teachings on the subject of breathing, silence and the position of persons in sleep, the teacher, and the witnesses and other members who believed in them and testified to the benefits which in their opinions were derived by them from such instruction. (Rec. 291, 292, 298, 300, 303,

309, 312, 314, 320, 329, 330, 333, 337, 344, 346, 356, 364, 366, 369, 379, 381, 382, 383, 385, 391, 413, 416, 420)

The Circuit Court of Appeals in its opinion held that the subjects of "breathing" and "silence" find expression as a religious practice in the ancient Yoga creed (29 Encyclopedia Americana 638) and that they constitute "religious doctrine." (Rec. 511) Nevertheless, that court sustained the action of the trial court in instructing the jury that the question whether such matters were within the field of religion, as taught by petitioner, (Rec. 510, 511) was an issue of fact for the jury.

Petitioner did not testify as a witness on the trial. Consequently he was not subject to impeachment because of any alleged past criminal record and no reference could properly be made to his failure to take the stand (Sec. 632 Title 28 U. S. C.). Both of such results, however, were accomplished in the following manner:

The taking of the testimony was closed on Friday afternoon, February 16, 1945, about 2:30 and the jurors were allowed to separate and go to their homes. In the evening edition of the Chicago Daily News, a newspaper with wide circulation, there appeared an article which the Circuit Court of Appeals in its opinion in the case at bar describes as (Rec. 512) "inflammatory and prejudicial" in character and its publication prior to verdict "improper and unethical." That article stated (see pp. 3, 4, *supra*) that petitioner had "dodged the witness stand in his Federal Court fraud trial this afternoon, and averted a show-up of his career as a highway robber." The article further stated that the Prosecutor "had planned to put into the record in cross-examination the fact that petitioner had served a prison term in New York state for highway robbery."

This article was made the basis of a motion by petitioner's counsel on the following Monday morning for a

mistrial. At petitioner's request a poll of the jury was had which established the fact that one of the regular members of the jury panel had read the article in question. The record shows that the trial judge was sufficiently concerned with the seriousness of the motion based upon the damaging and prejudicial character of the newspaper article as to contemplate the substitution of an alternate juror. When he ascertained that the governing statute would not permit such substitution, he stated that he would not substitute an alternate for the juror who had read the article. Despite such conclusion, he denied the motion for mistrial. In so doing he stated in referring to such article: "One juror did read it, he said it was what took place after the closing of the case on Friday, and that is why I denied the motion" (Rec. 453).

Notwithstanding its recognition of the inflammatory and prejudicial character of the newspaper article the Circuit Court of Appeals held that the poll of the juror who read the article indicated that his mind "was not in any way affected by what he had seen or read." That court concluded that "under such circumstances we think Appellant (petitioner) has failed to show prejudice resulting to him from the publication of the article and we hold that there was no abuse of discretion on the part of the trial court in the denial of his motion." That the mind of the juror in question who admittedly read the article was prejudicially affected appears on pages 28 to 30 hereof.

The Circuit Court of Appeals in its decision sustained the action of the trial court in instructing the jury that the presumption of innocence is not intended to aid anyone *who is in fact guilty* of crime to escape (Rec. 515).

Reasons for Granting the Writ.

At no time in its history has this Court evidenced a greater interest in the protection of religious freedom than since its reconstitution beginning in 1937. In *United States* v. *Ballard*, 322 U. S. 78, this Court dealt with fundamental questions of accommodation of the Mail Fraud Act to the free exercise of religion guaranteed by the First Amendment to the Constitution, and with the proper manner of implementing such Constitutional protection in criminal trials where the alleged scheme to defraud involved representations embraced within the religious beliefs of the defendant. The Court by the instruction complained of herein—by leaving to the jury whether representations of petitioner relating to the subjects of breathing, silence and position of persons during sleep were in their opinions matters within the field of religion as taught by petitioner and by instructing that only in the event that such matters were found by the jury as a fact to be within the field of religion, as taught by petitioner, that the truth or falsity thereof might not be questioned by them in arriving at their verdict—was instructing the jury in a manner which probably conflicts with the decision of this Court in *U. S.* v. *Ballard*, 322 U. S. 78, and the Circuit Court of Appeals of the 7th Circuit in affirming the judgment of the District Court has decided a question of Constitutional law affecting the free exercise of religion which has not been, but which should be, settled by this Court.

The substantial increase in religious prejudice and intolerance resulting from the teachings of Hitler and his followers has very greatly heightened during the past decade the danger, always substantial, that criminal trials of persons of unorthodox religious beliefs would descend into "heresy" trials. This is especially true where the

strange religious beliefs find expression in teachings which are treated by the Government as being embraced within an alleged scheme to defraud. In such cases only the wisest and most intelligent guidance of the jury by judges of unusual competence and religious objectivity can assure to the accused performance by the Government of the guarantee of the free exercise of his religion which the Constitution justified him in assuming to be his legal right.

In *United States* v. *Ballard*, 322 U. S. 78, this Court gave practical recognition to the need of expanding the province of the judge and narrowing the field of jury inquiry as much as possible by foreclosing any issue as to the truth or falsity of representations concerning matters of religious beliefs of defendants in mail fraud prosecutions and by requiring the court to charge the jury as a matter of law that they must assume to be true in arriving at their verdict all representations of such character. The instruction complained of herein raises an issue of paramount Constitutional importance calling for settlement by this Court, whether the protection provided by the principles laid down in *United States* v. *Ballard*, 322 U. S. 78, may be undermined by making the application of the conclusive presumption of truth regarding all representations concerning matters of religious belief of the defendant in a mail fraud case depend upon the determination by the jury in a manner favorable to the defendant of a preliminary inquiry whether the representations in question are believed by the jury to be matters within the field of religion, as taught by the defendant.

The other questions presented herein are important questions of law arising in the trial of criminal cases in the Federal Courts which require settlement by this Court.

Protection of persons accused of felony from deprivation of a fair trial in the Federal Courts through gross

prejudice resulting from a grossly inflammable and prejudicial newspaper publication read by one of the jurors, asserting that the defendant had served a prison term for robbery (of which there was no evidence) and that by failing to take the witness stand he prevented the planned cross-examination by the prosecutor as to such alleged prison record, raises issues of civil liberty of fundamental importance, calling for the controlling guidance of this Court. The instant case is the first and only one we have seen in which the defendant was denied a new trial when a newspaper article of an admittedly grossly prejudicial and inflammatory nature was actually read by a juror during the trial and the matter was promptly brought to the attention of the trial judge by an appropriate motion of the defendant.

Instructions as to the presumption of innocence are given in practically all felony trials. To permit to stand, sanctioned by a decision of one of our most respected Courts of Appeal, a form of such instruction which in effect tells the jury that the presumption of innocence applies only in favor of innocent defendants would do incalculable harm to the prestige of Federal criminal justice. It would constitute retrogression to the kind of attitude toward persons accused of crime which it has taken English and American courts hundreds of years to overcome. It manifestly calls for supervision and settlement by this Court.

The decision of the Court of Appeals herein, affirming the denial of petitioner's motion to withdraw a juror and continue the case, because of the prejudice to the petitioner resulting from the reading of the admittedly grossly inflammatory newspaper article by one of the jurors, conflicts with the decisions in *Harrison* v. *United States*, 200 Fed. 662, by the Circuit Court of Appeals for the Sixth Circuit, in *Griffin* v. *United States*, 295 Fed. 437, by the

Circuit Court of Appeals for the Third Circuit, in *United States* v. *Montgomery*, 42 Fed. (2) 254, by Judge Woolsey, sitting in the District Court for the Southern District of New York, and in *United States* v. *Ogden*, 105 Fed. 371, by Judge McPherson, sitting in the District Court for the Eastern District of Pennsylvania.

The decision by the Circuit Court of Appeals, approving the instruction given herein relative to the presumption of innocence, conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Gomila* v. *United States*, 146 Fed. (2) 372.

Wherefore, it is respectfully submitted that the Petition for Writ of Certiorari should be allowed.

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